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July 7, 2006

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Re: State of Oklahoma v. Tyson Foods, Inc., et al.

Gentlemen:

I have reviewed Plaintiff's Objections and Responses to Interrogatories and Request for Production of Integrator Defendant Simmons Foods, Inc. Please consider this letter our attempt to confer in good faith with the State in an effort to secure the information sought in Simmons' discovery requests without court intervention, pursuant to FRCP 26(a)(2)(B).

The most pressing problems with the State's discovery responses are described in detail below under separate headings for convenience. Simmons has other concerns, especially with respect to the intended scope and effect of the "general objections" the State has raised. Simmons reserves the right to seek Court relief from all aspects of the State's discovery responses if its concerns cannot be resolved by agreement, as they are discovered and arise. If the pressing problems are not corrected by noon on next Tuesday, July 11, Simmons will file a motion to compel proper responses.

Robert Allen Nance, Esq.
Richard T. Garren, Esq.
July 7, 2006
Page 2

Privilege Log Issues

The State's discovery responses are accompanied by a short privilege log. Please confirm that this privilege log describes all materials responsive to Simmons' discovery requests the State has withheld on privilege grounds. If the State has withheld additional materials that are not listed on the log attached to the State's discovery responses, please so inform us and supplement the log immediately. I also note that the privilege log does not identify which withheld materials would be responsive to which discovery request. Please inform Simmons immediately in writing which withheld materials are responsive to which requests. Without this information, Simmons has no realistic hope of evaluating the privilege claims.

June 30 Document Index

The State's discovery responses stated that as documents were produced, the State would identify the discovery requests to which those documents were responsive. Although a blanket statement that answers are contained in unspecified documents is an inappropriate answer to interrogatories, as set forth below, Simmons waited in good faith to see if the promised document list would resolve some of the discovery deficiencies.

On June 30, Mr. Nance sent me a letter transmitting "indices of documents responsive to certain interrogatories and requests for production of documents." Review of the indices reveals that they add nothing substantive to the State's refusals to answer the discovery requests. Simmons asked the State a handful of very specific questions, to which the State either has an answer or not. The list of publicly available websites which the State has identified as "potentially responsive to several of this Poultry Integrator Defendant's Interrogatories" do not answer those specific questions. Simmons asks that the State actually answer the interrogatories immediately.

FRCP 33(d) Business Records Instead of Answers

Rather than answering the interrogatories, the State has referred Simmons to various "business records" which the State has produced or may produce in the future, which the State maintains may contain the answers. The State's responses are inadequate. FRCP 33(d) requires a party referring to business records rather than answering to specify the records from which the answer may be derived or ascertained and the identification must be in enough detail that the party asking the interrogatory can locate and identify the requested information as readily as the party answering the discovery.

General references to unspecified business records which may be produced in the future, or to websites, do not satisfy Rule 33. Simmons asks that the State immediately amend its discovery responses to specifically identify any documents which it contends contain the answers to the specific questions asked by Simmons.

Robert Allen Nance, Esq.
Richard T. Garren, Esq.
July 7, 2006
Page 3

Privilege and Work Product Claims

The State essentially refused to answer any of Simmons' interrogatories or the document request on the theory the factual information is subject to privilege or constitutes work product. This position is erroneous. Facts in the State's possession are not privileged, nor are facts work product. Simmons asks that the State immediately answer Simmons' discovery requests with any information in its possession, regardless of who happens to know those facts or how they were gathered. Simmons also notes that the short privilege log submitted with the State's discovery responses lists materials authored by various state agencies. Materials produced during the ordinary course of an agency's business are of course not considered attorney work product. The privilege log does not contain enough information for Simmons to make any educated evaluation of the privilege or work product claims.

The Specific Interrogatories Which The State Failed to Answer

Interrogatory No. 1. This interrogatory asked the State to simply state, for each calendar year 1985 through 2005, the total amount of P loading for that year to Lake Tenkiller resulting from the land application of poultry litter in the Illinois River Watershed. The State refused to answer, saying the fact was subject to privilege or was work product. The State also refused to answer, saying the answer may have already been given in some unidentified prior disclosures. Finally, the State made the general answer that the answer might be found in unidentified business records which would occur on a rolling basis in the future.

None of those responses is appropriate. If the State has arrived at some number as a fact, then Simmons is entitled to the number, not shortly before trial when expert reports are exchanged, but now when the question is asked. If the State has arrived at some number, Simmons is not required to sift through unidentified prior disclosures or unspecified business records which may be produced in the future. If the actual answer is the State has no idea what the figure is, Simmons is also entitled to that answer.

Interrogatory No. 2. This interrogatory asked the State to tell Simmons, for each calendar year 1985 through 2005, the total amount of N loading for that year to Lake Tenkiller resulting from the land application of poultry litter in the Illinois River Watershed. Again, the State refused to answer on the same grounds it refused to answer Interrogatory No. 1. And again, none of those responses is appropriate. Simmons has asked for a straightforward piece of factual information. If the State has that information, then the State should answer the question and tell us. If the State does not have information, Simmons is also entitled to know that.

Interrogatory No. 3. This interrogatory asked, for the amounts of P and N loading identified in answer to the first two questions, how much of that came from poultry growers under contract with Simmons Foods, Inc. The question is not a hard one. If the State has arrived at some particular numbers for P and N, tell us how much of it the State says came from growers under contract with Simmons.

Robert Allen Nance, Esq.
Richard T. Garren, Esq.
July 7, 2006
Page 4

The State refused to answer this question, again citing the theory that facts known to the State are somehow secrets, privileged or attorney work product. Simmons has already addressed this bogus objection above. The State also refuses to answer the question because the question conflicts with the State's legal theory, that it does not have to prove what contribution if any a particular Defendant supposedly made to the claimed pollution. It should not come as any huge shock to the State that it cannot legitimately refuse discovery requests because those requests don't agree with the State's legal theories. The State should answer the interrogatory immediately, if it has an answer.

Finally, after all the objections refusing to answer, the State purports to give an answer. The answer is that "Defendant Simmons and/or persons, activities or entities for which Defendant Simmons is legally responsible have contributed P and N loading to Lake Tenkiller during the indicated period." This is nothing more than a repetition of the State's legal theory. That is not what the interrogatory asked. The State should immediately answer the question.

Interrogatory No. 4. This interrogatory simply asks for each of the State's answers to Interrogatories No. 1 and 2, how the State knows the answer. The State just incorporated its numerous objections to those interrogatories.

Simmons is entitled to know the figures the State has arrived at, if the State has done so. Simmons is equally entitled to discover how the State came to know that information. There is nothing privileged about the information being requested. And it is vanishingly unlikely that some unidentified prior document production, or unidentified business records which may be produced sometime in the future, will contain that simple answer. The State should answer the question immediately.

Interrogatory No. 5. This final interrogatory asked the State to identify all persons who have suffered any adverse health effect as a result of water contact in the Illinois River Watershed which was caused by the land application of poultry litter. The State once again refused to answer this question, on the theory that the identity of people harmed by water contact is privileged, or secret attorney work product. By now the State knows Simmons' position—facts are not privileged or work product. Facts are discoverable.

The State also objected that the question was ambiguous. However, the State never contacted Simmons before the answers were due to discuss what information Simmons was looking for, or how the request should be interpreted. If the State had gone to the trouble to ask, Simmons would have explained the term is intended to include any sort of health problems the State has decided to attribute to the land application of poultry litter.

After stating all these objections and refusing to answer, the State gave the general answer that:

health risks from the improper and concentrated release and disposal of poultry waste in the IRW include, but are not limited to, infection by bacteria or other

Robert Allen Nance, Esq.
Richard T. Garren, Esq.
July 7, 2006
Page 5

pathogens, presence of trihalomethanes in drinking water, with the potential for formation of more, nitrate pollution of groundwater, toxic blue-green algae, and the effects of arsenic and other heavy metals. The State is currently investigating reports of illness caused by the Defendants improper waste disposal activities.

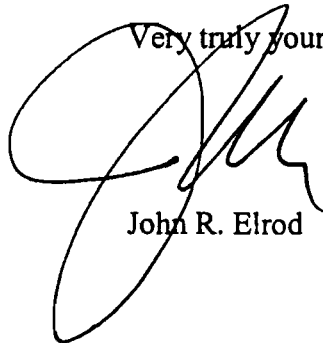
Simmons is aware of the State's position about health risks. That is clearly not what Simmons was asking. If the State is investigating reports of illness, and has some to report, that is what the interrogatory asks about. The State should answer with any information it has. If the investigations have not turned up a single person experiencing adverse health effects, then Simmons is entitled to that answer.

Request For Production No. 1. Simmons' only request for production of documents asked for copies of all studies, datasets, articles and any other documents that support the State's answers to the first four interrogatories about P and N loading. Since the State refused to answer any of those interrogatories, the State has refused to produce any responsive documents.

This position is unsupportable. If the State has answers to the simple questions about the amounts of P and N loading, and how much the State attributes to growers under contract with Simmons, the State should answer. If the State has figures, then the State should produce whatever documents it is relying on to get to those figures. If the State does not know the answers to the first four interrogatories, it should just say so and that would resolve the request for production.

It is crucial that the State answer Simmons' discovery requests, either voluntarily or by Court order. The information Simmons is seeking is basic to the defense of this case. Having decided to bring the case and sue Simmons, the State cannot hide the ball from Simmons. Please let me know whether the State will comply with the discovery requests, which would be the most sensible solution. If it will not, Simmons will be forced to seek relief from the Court.

Very truly yours,

A handwritten signature in black ink, appearing to be 'J. Elrod', written over the typed name 'John R. Elrod'.

John R. Elrod

cc: Counsel of Record